APPENDIX

[Relevant Pages from Respondent's Brief to Virginia Supreme Court]

VII. THE TRIAL COURT PROPERLY DENIED SWISHER'S MOTION TO SUPPRESS EVIDENCE.

In a somewhat confusing argument, Swisher contends that the trial court erred when it denied his motion to suppress "all evidence, oral and physical, including any statements made by the Appellant whether prior to or subsequent to his arrest, and any property seized as a result of the arrest, detention or interrogation of him and any property seized by a warrantless search of the premised occupied by the Appellant, and any property or goods seized by virtue of the search warrant for his body." (Swisher's Br. at 16). The gist of Swisher's argument appears to be that any evidence gathered prior to his arrest somehow was illegally obtained and resulted in his illegal arrest, while evidence gathered after his arrest was the fruit of the supposedly unconstitutional arrest.[5] The trial judge, however, correctly found that Sheriff's deputies "had permission for every aspect of this [search]" (JA 531), and properly rejected Swisher's arguments.[6]

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[5] Any claim of an "illegal arrest" after Ridgeway informed the police of Swisher's February 22, 1997 confession is frivolous.

[6] Although Swisher contended in a written pleading filed with the trial court on July 24, 1997 that, among other things, pubic hairs, head hairs and blood were illegally obtained from his person, Swisher did not pursue this portion of his motion at the hearing held September 10, 1997, and did not obtain a ruling from the trial court on this allegation. (JA 449-533). This failure constitues a procedural default, and precludes review by this Court. Rule 5:25. It is undisputed in any event that this search was pursuant to a warrant, and Swisher does not contend that the

Whether a consent search is voluntary is a question of fact to be determined by the trial court and it's decision will be upheld on appeal unless it is clearly wrong. *Stamper v. Commonwealth*, 220 Va. 260, 268, 257 S.E.2d 808, 814 (1979), *cert. denied*, 445 U.S. 972 (1980). There is ample evidence to support the trial judge's conclusion that Swisher's consent was voluntarily given.

In a pretrial hearing on Swisher's motion, Augusta County Sheriff's deputies testified that on February 23, 1997, they went to the house Swisher shared with his uncles, Paul and William. They knocked on the door, asked to speak with Swisher and were admitted to the house by Paul. (JA 520-521). Paul led officers to Swisher's room and, after asking him to accompany them to the Sheriff's Department, he voluntarily did so. (JA 522). Swisher was specifically told he was not under arrest and was free to leave if he chose to do so. (JA 522-523). Before leaving the home and because it was a cold night, Swisher was asked if he wanted a jacket and deputies picked up a jacket found lying in the house for him to wear. (JA 455-456, 522). Sergeant William Lemerise testified that once at the Sheriff's Department, he noticed a few dark spots on the jacket and asked Swisher for permission to test the jacket with luminol. Swisher agreed. (JA 456). When the luminol test was positive, Lemerise asked Swisher for permission to send the jacket to the forensic laboratory for further testing and Swisher again agreed. (JA 456-457).

Later that evening, but before Swisher was arrested for Snyder's murder, officers returned to the Swisher home

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warrant was improperly issued or the search improperly conducted. *See Waye v. Commonwealth*, 219 Va. 683, 694, 251 S.E.2d 202, 209 (physical evidence, including pubic hairs, obtained from the defendant pursuant to warrant proper when unaccompanied by "brutal" or "offensive" force), *cert. denied*, 442 U.S. 924 (1979).

and asked Paul Swisher for permission to search two large "burn barrels" adjacent to the Swisher house. He agreed (JA 457) and several burned items, including burned Levi's, burned sneakers and a green shirt, were recovered from the barrels. (JA 458).

The next day, February 24, 1997, deputies asked William Swisher for permission to search the Swisher house. William was provided with a consent form and was specifically told he did not have to consent to a search. (JA 459, 483-484). William, however, agreed to the search and signed the consent form. A search ensued and a pillowcase, a towel, a bed sheet, a second pair of Levi's and a shirt were confiscated. (JA 459).

None of the items taken from the consensual search of the burned barrels or found during the February 24, 1997, consensual search of the house was admitted into evidence at Swisher's trial. Thus, there can be no error on appeal from the trial judge's refusal to suppress them.[7] Likewise, there is no error in the trial judge's refusal to suppress the jacket. Swisher, after all, voluntarily accompanied deputies to the Sheriff's Department and consented both to the luminol testing performed on his jacket and to further testing by the forensic laboratory. The mere fact that Swisher was at the Sheriff's Department when he allowed his jacket to be tested certainly did not invalidate his consent as a matter of law. *Gray*, 233 Va. at 327, 356 S.E.2d at 164. The record clearly supports the trial judge's finding that the consent was voluntarily given for each search, and Swisher's claim must fail.

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[7] Any argument by Swisher that the Augusta County Sheriff's Department search of the burn barrels provided evidence which was used to illegally arrest him must be rejected in light of Paul Swisher's express consent to search the barrels. *See also California v. Greenwood*, 486 U.S. 35, 44 (1988) (Fourth Amendment does not prohibit warrantless search and seizure of garbage left for collection).